



Human Rights Council
Working Group on Arbitrary Detention**Opinions adopted by the Working Group on Arbitrary Detention at its eighty-seventh session, 27 April–1 May 2020****Opinion No. 30/2020 concerning Faruk Serdar Köse (Turkey)**

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.

2. In accordance with its methods of work (A/HRC/36/38), on 8 November 2019 the Working Group transmitted to the Government of Turkey a communication concerning Faruk Serdar Köse. The Government replied to the communication on 7 January 2020. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category D);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).



Submissions

Communication from the source

4. Faruk Serdar Köse is a national of Turkey born in 1996. He is a student and related to an individual who has been prosecuted and is currently detained on charges of membership in the Hizmet movement, referred to as the “Fethullah terrorist organization/Parallel State Structure” by the Government of Turkey, and on corruption-related charges.

a. Arrest and detention

5. According to the source, Mr. Köse was arrested on 16 November 2017 by the Turkish police and is still detained. He was first detained at a police station, before being transferred to Silivri Prison. He was taken into custody pursuant to article 314 of the Criminal Code for membership in an armed organization, a charge based on the fact that the ByLock application, used for engaging in secured communications, was installed on his telephone. In the same ByLock group were other suspects who were part of the same investigation. The authorities strongly suspect that membership in that group also points to membership in an armed terrorist organization.

6. The source contends that the arrest and investigation of Mr. Köse is part of a widespread campaign to arrest all alleged sympathizers of the Hizmet movement, who have been targeted by the Turkish authorities, especially since a large-scale investigation was launched by the Office of the Chief Public Prosecutor in December 2013 into suspicions of corruption and bribery involving high-ranking government officials and, more systematically, since the attempted coup in July 2016. The members of the movement, which is led by Fethullah Gülen, are suspected by the Turkish authorities of having orchestrated both events. The movement is referred to by the authorities as the Fethullah terrorist organization. According to the source, alleged members of the movement are arrested on charges of terrorism and organized crime, detained in police detention facilities for extended periods of time and tortured to extract confessions. Moreover, they are denied due process guarantees, including access to a fair trial. Evidence of participation in crimes and membership in the movement and related criminal charges usually include being a client of a movement-affiliated institution such as Bank Asya, having a subscription to the Hizmet movement-affiliated *Zaman* newspaper, holding union membership, holding membership in certain business associations, volunteering for certain charities, possessing publications by Fethullah Gülen, cancelling Digiturk subscriptions, possessing \$1 bills and downloading encrypted messaging software such as the ByLock application.

7. Mr. Köse was kept in police custody until 28 November 2017 without any legal process. On 28 November, he was finally interrogated by the police. He was informed that his statement was being taken within the framework of investigation No. 2017/154015, carried out by the Istanbul Office of the Chief Public Prosecutor’s terrorism and organized crime bureau, and that he was being charged with being a member of the Fethullah armed terrorist organization.

8. The source reports that the police asked Mr. Köse how many telephone numbers he used, if he had attended a training course or a private school, if he was a member of a union, association or non-governmental organization, if he had a passport and travelled abroad, especially to Pennsylvania, United States of America, if he had attended an event where Fethullah Gülen was present or had met him or someone who had participated in such an event. The police also reportedly inquired about his use of the ByLock application and a related telephone number and about the fact that his identification number matched the one of the detained family member. They also asked if he had an account with Bank Asya and if he made donations to associations and charities.

9. The source indicates that Mr. Köse answered that he had not attended a training course or a private school, that he was not a member of an association, union or non-governmental organization, that he did not have a passport, that he had not met or attended a meeting with Fethullah Gülen or any other participant in such a meeting, that he did not

use the mentioned telephone number or the ByLock application and that he had not opened an account with Bank Asya nor had he made donations to any association or foundation.

10. On 29 November 2017, Mr. Köse was brought before a judge. During the hearing, he was not permitted to present any information in his defence. The source suggests that the authorities are detaining Mr. Köse because they are not satisfied with the investigation and sentencing of the above-mentioned family member. According to the source, Mr. Köse is being detained merely on suspicion of using the ByLock application with the same telephone number. Other family members are being investigated as well, under similarly insufficient and fabricated charges.

b. Analysis of violations

i. Category I

11. The source submits that Mr. Köse was arrested and detained without any legal basis, in violation of the Constitution, Turkish criminal law, article 9 of the International Covenant on Civil and Political Rights and article 9 of the Universal Declaration of Human Rights. Mr. Köse was arrested and detained without being shown any evidence against him in the aftermath of the 2016 attempted coup and it cannot be said beyond any reasonable doubt that he has committed the crime he has been charged for.

12. The source notes that, in accordance with the principle of legality, each crime and all related punishments must be clearly defined and prohibited in the law. Mr. Köse has not been charged for committing a clearly defined crime; the use of the ByLock application is not defined as a crime in the law. In addition, Mr. Köse has always denied ever using ByLock and no evidence confirming the claim that he used it has been submitted by the prosecutor.

13. In addition, the source alleges that Mr. Köse's arrest is contrary to article 91 (2) of the Code of Criminal Procedure, which states that, for an individual to be taken into custody, there must be evidence indicating that a crime has been committed. The source adds that it is also contrary to articles 100 and 101 of the Code, which provide that for a person to be detained, solid evidence suggesting strong criminal suspicion must be shown at the time of the detention and concrete facts must suggest that judicial control would not be a strong enough measure, and that all evidence, facts and findings about these issues must be clearly expressed in the justification. In Mr. Köse's case, no solid evidence showing strong criminal suspicion was presented and no justification for the detention was given. The arrest and the detention warrant did not include any concrete facts or findings to justify the detention or show why judicial control would be insufficient. No evidence was presented suggesting that there was strong suspicion that the crime had been committed by Mr. Köse.

14. According to the source, it constitutes arbitrary detention and is a breach of article 9 of the Covenant to keep suspects in detention in inhumane conditions for five or more days without taking their statement or starting judicial proceedings, as was the case for Mr. Köse. Mr. Köse was arrested and remained in detention for 13 days without being notified of any procedure against him, and nothing in the evidence produced justifies his detention. Similarly, the state of emergency following the attempted coup in 2016 does not make the length of the detention compatible with article 9.

ii. Category II

15. The source argues that Mr. Köse has been deprived of his liberty for exercising his rights under articles 18, 19, 21, 22, 25 and 27 of the Covenant.

16. Specifically, the source alleges that Mr. Köse was accused of downloading and using the ByLock application, which is available on all public platforms and the use of which is legal. He is also accused of having telephone conversations with persons who have been prosecuted for their alleged membership in an armed terrorist organization.

17. The source underscores that it is claimed that Mr. Köse used a specific telephone number, one registered to a family member. That number was allegedly used to make

telephone calls to suspected members of an armed terrorist organization. There is no evidence in the file that Mr. Köse has ever actually used that telephone number and the conversations mentioned as evidence took place years before the day of the arrest, when Mr. Köse was still a minor and before the family member associated with the telephone number had been arrested. The source notes that none of the content of any of the conversations was filed as evidence and that the Turkish Supreme Court has ruled that the content of communication records that is not certain cannot constitute evidence. Finally, the Fethullah armed terrorist organization, of which Mr. Köse is accused of being a member, did not exist at the time when the telephone number was in use.

18. The source recalls that telephone conversations constitute a legal activity protected by article 12 of the Universal Declaration of Human Rights and that the reasons given for the arrest of Mr. Köse constitute fundamental rights protected by the Covenant.

iii. Category III

19. According to the source, Mr. Köse suffered serious violations of his right to a fair trial as provided for by article 14 of the Covenant.

20. Mr. Köse was deprived of the opportunity of being brought before an independent and impartial tribunal. Following the entry into force on 28 June 2014 of Law No. 6545, special courts were created to investigate and prosecute suspected members of the Hizmet movement. The entire procedure for the arrest and detention of Mr. Köse was handled by these special tribunals and appellate courts, in closed circuit. The source contends that, according to the European Court on Human Rights, the independence of these courts is questionable since there are no guarantees against external influence and judges are dismissed from duty when they issue a decision contrary to the Government's directions, for instance.

21. The source also argues that there is a practice of widespread dismissals and arrests of judges and prosecutors, which undermines the right to a fair trial in Turkey. Specifically, judges and prosecutors who decide in favour of a suspected member of the Hizmet movement can be dismissed and even detained. This cannot guarantee the independence and impartiality of tribunals, and thus a fair trial.

22. The source then recalls that Mr. Köse was not provided with a timely explanation for the reason for his arrest and was held without being notified of the charges against him. In addition, the principle of equality of arms was violated since he was denied access to his file on the grounds of article 153 of the Code of Criminal Procedure, which concerns files of a public or political nature. He was thus unable to prepare his defence adequately and challenge the charges against him. He was also not granted a court hearing for an extended period of time, preventing him from challenging his detention. When he was finally able to do so, his applications were denied on insufficient grounds.

23. Moreover, Mr. Köse's access to a lawyer was impeded by the climate of fear and the pressure faced by defence lawyers and by the increased number of procedural barriers preventing them from defending their clients under the pretext of counter-terrorism efforts.

24. The source thus concludes that Mr. Köse was denied the right to a fair trial.

iv. Category V

25. The source recalls that Mr. Köse's continued detention, which is being enforced due to his social background, is discriminatory in nature and therefore arbitrary. Indeed, whether or not he is actually a member of the Hizmet movement does not change the fact that he is being prosecuted for his membership in or for sympathizing with an organization, which is discriminatory.

26. Considering all of the above, the source therefore concludes that Mr. Köse's arrest and detention are arbitrary.

Response from the Government

27. On 8 November 2019, the Working Group transmitted the allegations from the source to the Government under its regular communications procedure. The Working Group requested the Government to provide, by 7 January 2020, detailed information about the current situation of Mr. Köse and to clarify the legal provisions justifying his continued detention, as well as its compatibility with the obligations of Turkey under international human rights law and, in particular, with regard to the treaties ratified by the State. Moreover, the Working Group called upon the Government of Turkey to ensure Mr. Köse's physical and mental integrity.

28. In its reply of 7 January 2020, the Government reaffirmed that Turkey, as a democratic State governed by the rule of law and as a founding member of the Council of Europe, upholds human rights, the rule of law and democracy. Turkey continues to fight against several terrorist organizations within the framework of its Constitution and legislation and in compliance with its international obligations and the fundamental principles of a democratic State. The Government then recalls its national legal provisions on human rights.

29. The Government provides an overview of the terrorism threats faced by Turkey and the measures taken to respond to the security challenges posed by terrorist organizations. The Government submits background information, especially with regard to the Fethullah terrorist organization/Parallel State Structure, an alleged armed terrorist organization. The Government also refers to the attempted coup of 15 July 2016, noting that there are ongoing investigations into and trials pending against the organization's members in relation to the alleged attempt to overthrow the Government.

30. The Government argues that Mr. Köse has been deprived of his liberty in accordance with the decisions of the competent courts. All the proceedings that have led to his custody, detention and conviction have been carried out in accordance with the relevant legislation as well as the international obligations of Turkey.

31. According to the Government, on 16 November 2017, Mr. Köse, who was at home, was taken into custody following the issuance by the thirteenth Magistrates' Court of Istanbul of an arrest warrant. On 17, 19 and 21 November 2017, he was given the opportunity to meet his lawyer. On 28 November 2017, he gave his testimony in the presence of his lawyer at the police department. On 29 November 2017, he was brought before a judge, gave his testimony and the seventh Magistrates' Court of Istanbul ordered pretrial detention on the basis of "membership in an armed terrorist organization" because judicial control measures would have been inadequate considering the gravity of the charges and the presence of strong suspicion. Mr. Köse objected to his detention and asked for his release before the eighth Magistrates' Court of Istanbul, which overruled the request. On 24 December 2017 and 24 January 2018, the competent courts, in compliance with article 108 of the Code of Criminal Procedure, reviewed the detention of Mr. Köse.

32. At every stage of the investigation process, Mr. Köse was informed of his rights and of the charges against him and was given the opportunity to inform a member of his family. The indictment concerning Mr. Köse, issued on 26 January 2018, was accepted on 22 February 2018 and the twenty-sixth Assize Court of Istanbul ruled for the continuation of detention.

33. On 8 April 2018, Mr. Köse was convicted by the twenty-sixth Assize Court of Istanbul to six years and three months of imprisonment for being a member of an armed terrorist organization. His lawyer appealed before the Regional Court of Justice. On 17 September 2018, that Court upheld the decision of the Assize Court. Subsequently, the lawyer appealed before the Court of Cassation, where the case is currently being considered.

34. The Government contends that all the proceedings against Mr. Köse have been carried out swiftly and in accordance with the international obligations of Turkey despite the fact that Turkey, during the time of Mr. Köse's detention, had already submitted notifications of its decision to avail itself of the right of derogation from its international obligations to the Council of Europe, in accordance with article 15 of the Convention for

the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), and to the Secretary-General of the United Nations, in accordance with article 4 of the Covenant.

35. The Government submits that, in accordance with article 11 of Decree Law No. 684 of 23 January 2017, which was in force at the time of the present case, a person can remain in custody for seven days if he or she is suspected of committing a crime falling under the scope of the counter-terrorism law (No. 3713). In case of numerous suspects or difficulties in collecting evidence, the duration of custody can be renewed for an additional seven days. Therefore, the suspect can remain in custody for 14 days in total.

36. In the present case, Mr. Köse was taken into custody on 16 November 2017. On 22 November 2017, the Istanbul Office of the Public Prosecutor extended the duration of the custody for an additional seven days in accordance with article 11 of Decree Law No. 684. Mr. Köse was brought before a judge on 29 November 2017, within the legal time frame.

37. According to the Government, at every stage, Mr. Köse was informed about his legal rights and was given the opportunity to report his situation to a member of his family or close relative in compliance with articles 90 (4) and 95 (1) of the Code of Criminal Procedure. In fact, the facts of his custody and its extension were notified to a member of his family and to his lawyer. These notifications were recorded on 16 and 22 November 2017. Also, during the whole time that Mr. Köse remained in custody, he was granted access to his lawyer.

38. The Government submits that the arrest warrant issued by the thirteenth Magistrates' Court of Istanbul was based on the reasonable doubt that Mr. Köse was a member of the Fethullah terrorist organization since he was actively using the ByLock application, an encrypted messaging application, in order to contact individuals also suspected and/or convicted of membership in that same terrorist organization. The reasons justifying his custody and his legal rights were explained to him on 16 November 2017, the day he was taken into custody.

39. On 28 November 2017, Mr. Köse gave testimony in the presence of a lawyer appointed by the Istanbul Bar Association, in accordance with article 150 of the Code of Criminal Procedure. That article did not prevent Mr. Köse from choosing his own lawyer, but no such written or oral request was made by Mr. Köse.

40. Therefore, the Government rejects the allegations implying that Mr. Köse was detained for 13 days without being notified of any procedure or the charges against him as unfounded. Mr. Köse was informed of his legal rights and of the charges against him and was granted access to a lawyer, in compliance with the Code of Criminal Procedure, during the whole time he remained in custody.

41. On 29 November 2017, Mr. Köse was brought before a judge and the seventh Magistrates' Court of Istanbul ruled that he should be placed in pretrial detention, as mentioned above. Also, with regard to the gravity of the charges, the Magistrates' Court considered that there was a risk of flight and manipulation of evidence.

42. The Government further argues that the twenty-sixth Assize Court of Istanbul ruled for the continuation of detention based on similar justifications. The reasoned decision of the Assize Court was issued on 8 April 2018. On the basis of that decision, Mr. Köse was convicted to six years and three months of imprisonment for being a member of an armed terrorist organization. Until his conviction, his detention was reviewed regularly (between 25 December 2017 and 8 April 2018, his detention was reviewed 20 times), in line with article 108 of the Code of Criminal Procedure.

43. According to the Government, article 100 of the Code of Criminal Procedure requires the presence of strong suspicion of having committed a crime to justify detention. In the present case, the fact that Mr. Köse used the encrypted messaging application ByLock constitutes strong suspicion of membership in the Fethullah terrorist organization since it is the main communication tool used by that organization's members. The installation and usage of the ByLock application is crucial evidence proving membership in the organization, since it was developed for the intra-organizational, confidential

communication among members and since access to it by the general public was not allowed.

44. The Government argues that ByLock is an application exclusively meant to allow for strongly encrypted communication between members of the Fethullah terrorist organization. Each message sent through ByLock is encrypted differently. ByLock was originally made available to the organization's members under the guise of a global application. After being accessible online as a global application for a short while, however, those wishing to download the application were obliged to access it through a virtual private network, Bluetooth or external memory so that the identities of the users could be disguised.

45. According to the Government, it was not sufficient to sign on to the application: user names and codes, provided mostly face-to-face or by an intermediary, had to be added by all users in order for them to communicate with each other. Messages could only be sent after both senders and recipients had added each other. Therefore, a person that had no connection to the Fethullah terrorist organization would not be able to download the application on his or her mobile telephone or communicate through it with other users.

46. The Government further submits that, in its reasoned judgment of 24 April 2017, the sixteenth Criminal Chamber of the Court of Cassation examined ByLock and concluded that there existed concrete evidence proving that ByLock was a network programmed for use by the members of the Fethullah terrorist organization and was used exclusively by the members of that organization. Additionally, the Criminal Division of the Plenary Court of Cassation (file No. 2017/956, judgment no. 2017/370 of 26 September 2017) has specified that use of ByLock shall constitute evidence of a connection between the application's user and the Fethullah terrorist organization, as the ByLock communication system was a network made available for use by members of that organization and was used exclusively by some of its members. Moreover, the Criminal Division of the Plenary Court of Cassation (file No. 2018/16-419, judgment No. 2018/661) has explicitly set out the connection between the use of ByLock and membership in the Fethullah terrorist organization.

47. The Government submits that it has been established that Mr. Köse used the telephone number 0553 535 1397 to access the ByLock application many times over a long period of time. He logged in 46,894 times, contacted members of the Fethullah terrorist organization and attended meetings of that organization. Therefore, the Government argues that there was strong suspicion indicating that Mr. Köse was a member of the Fethullah terrorist organization, which justified the measure of depriving him of his liberty.

48. The Government argues that throughout the whole legal procedure, and at every stage of the investigation and prosecution, a lawyer assisted Mr. Köse. All procedural documents bear the signature of the lawyer.

49. Turning to the allegation that Mr. Köse's lawyer was denied access to the case file and that he failed to prepare for his client's defence, the Government points to article 157 of the Code of Criminal Procedure, which permits some procedural acts undertaken during the investigation stage to be kept confidential so as to ensure that the public prosecutor carries out all the necessary steps with regard to the investigation. The confidentiality of the investigation does not hinder the right to a defence since, in accordance with article 153 (1) of the Code, a lawyer can examine the case file and obtain a copy of the documents throughout the investigation.

50. For investigations related to crimes falling under the scope of article 153 (2) of the Code of Criminal Procedure, a decision on confidentiality can be made by the relevant judge upon the request of the Public Prosecutor if the importance and the gravity of the investigation justifies it. Membership in an armed terrorist organization is cited among the crimes that can necessitate an additional confidentiality precaution. The existence of a decision on confidentiality does not affect the right of a lawyer to access the minutes of testimonies, expert reports and all procedural acts requiring the presence of Mr. Köse. It is also essential to underscore that, in any case, the confidentiality ends as soon as the indictment is issued. A lawyer can examine the case file and all the evidence and reports gathered during the investigation once the prosecution stage starts.

51. The Government submits that the investigation was promptly completed within two months and 10 days of Mr. Köse's arrest. The prosecution was also conducted effectively despite the heavy workload of the judiciary following the attempted coup of 15 July 2016. The court issued its ruling within 18 months.

52. The Government rejects the allegation regarding the breach of the right to a fair trial. All procedural guarantees related to the right to a fair trial were respected throughout the investigation and prosecution. Mr. Köse was convicted by competent courts based on reasoned decisions. Those decisions were made by an independent judiciary and all the proceedings throughout the trial were in accordance with the national legislation and the international obligations of Turkey.

53. The Government emphasizes that the judgment regarding Mr. Köse has not yet been finalized. The case is currently before the Court of Cassation. Moreover, Mr. Köse has the right to lodge an individual application before the Constitutional Court. Official records indicate that Mr. Köse has not yet lodged an individual application before the Constitutional Court. While there is a right to seek remedies, Mr. Köse has not claimed compensation in accordance with the relevant articles, including article 141, of the Code of Criminal Procedure. According to the fundamental principles of Turkish law, which are in line with the standards of international law, a request must be made in order for someone to be awarded compensation.

54. The Government highlights that the compensation mechanism introduced in article 141 of the Code of Criminal Procedure is recognized by the European Court of Human Rights as an effective domestic remedy. Since Mr. Köse has not lodged a claim for compensation, even though he has the right to do so under article 141 of the Code, no compensation has been granted to him. The Government also stresses that the requirement of exhaustion of domestic remedies is generally a recognized rule in international law. The obligation to exhaust domestic remedies is part of international customary law and is part of the case law of the International Court of Justice (see, e.g., the *Interhandel* (Switzerland v. United States of America) case of 21 March 1959). In the present case, domestic remedies have not been exhausted.

55. Consequently, the Government argues that the allegations communicated by the source to the Working Group on Arbitrary Detention are unfounded and should, therefore, be dismissed.

Additional comments from the source

56. On 14 January 2020, the response of the Government was transmitted to the source for additional comments, which the source submitted on 28 January 2020. The source rejects the Government's response as a mere chronological recital of events and argues that the only evidence for Mr. Köse's conviction is a telephone number that the source argues was not Mr. Köse's but rather that of his family member, who was the only person to have used it.

57. The source contends that a family member was dismissed from his position, arrested and convicted on terrorism charges. When he was convicted, the telephone number was accepted as evidence of the alleged charges. According to the Turkish judicial authorities, that number was used to download the ByLock messaging application, which is currently considered by the Turkish judiciary as sufficient evidence of membership in a terrorist group. That is to say, the Turkish judiciary has convicted both the family member and Mr. Köse for using the same telephone number. According to the source, as a basic legal principle, one criminal act can be tried only once. In the present case, two persons have been convicted for a single act, in other words for having used a telephone number to download a messaging application, which normally cannot be deemed as a crime.

58. Furthermore, the source argues that it is evident from the reports of independent expert witnesses that ByLock is an ordinary messaging application and could never be used as evidence of membership in a terrorist organization. The source adds that the appeal authority in the Turkish criminal court system has accepted that in the present case the information on ByLock was unlawfully acquired by the prosecution (decision No. 2018/335 of 14 February 2018). However, Yargıtay also insists on accepting the usage of ByLock as

evidence of membership in a terrorist organization. According to the source, unfortunately, the pieces of evidence that were unlawfully acquired continue to be used by the Turkish judiciary as the basis for criminal convictions.

59. The source contends that, in its reply, the Government defends the conviction of Mr. Köse by providing the results of historical traffic searches for the telephone number attributed to Mr. Köse. According to the source, however, those records do not reflect the use made of that number by Mr. Köse but, rather, by his family member.

60. The source therefore concludes that Mr. Köse has been convicted only for being related to the above-mentioned family member, as all the information in his file, which is alleged to be the evidence for his conviction, is not credible and unrelated to him.

Discussion

61. The Working Group thanks the source and the Government for their submissions and appreciates the cooperation and engagement of both parties in this matter.

62. As a preliminary issue, the Working Group notes that the situation of Mr. Köse falls within the scope of the derogations that the Government of Turkey had made under the Covenant. On 21 July 2016, the Government of Turkey informed the Secretary-General that it had declared a state of emergency for three months in response to the severe dangers to public security and order, which amounted to a threat to the life of the nation within the meaning of article 4 of the Covenant.¹

63. While acknowledging the notifications concerning the derogations, the Working Group highlights that the right not to be subjected to arbitrary deprivation of liberty is an absolute right and cannot be subject to any derogation. Furthermore, the Working Group emphasizes that, in the discharge of its mandate, it is also empowered under paragraph 7 of its methods of work to refer to the relevant international standards set forth in the Universal Declaration of Human Rights and to customary international law. Moreover, in the present case, articles 9 and 14 of the Covenant are most relevant to the alleged detention of Mr. Köse. As the Human Rights Committee has stated, States parties derogating from articles 9 and 14 must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.²

64. Furthermore, the Working Group clarifies that the procedural rules governing its consideration of communications on alleged cases of arbitrary detention are contained in its methods of work. There is no provision in the methods of work preventing the Working Group from considering communications just because domestic remedies in the country concerned have not been exhausted. The Working Group has also confirmed in its jurisprudence that there is no requirement for petitioners to exhaust domestic remedies in order for a communication to be considered admissible.³

65. Turning to the specific allegations, the Working Group notes that the source has argued that the detention of Mr. Köse was arbitrary, falling within categories I, II, III and V. The Government, while not addressing the categories of the Working Group separately, denies all the allegations and submits that the arrest and detention of Mr. Köse was carried out following all international human rights obligations undertaken by Turkey. The Working Group shall proceed to examine the submissions under each of the categories in turn.

¹ Depositary notification C.N.580.2016.TREATIES-IV.4.

² General comment No. 29 (2001) on derogations from provisions of the Covenant during a state of emergency, para. 4. See also general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 6; general comment No. 34 (2011) on the freedoms of opinion and expression, para. 5; and general comment No. 35 (2014) on liberty and security of person, paras. 65–66.

³ In its opinion No. 53/2019, the Working Group clarified that it did not require the exhaustion of domestic remedies to be seized of the communication under its regular procedure. See also opinions No. 19/2013, No. 38/2017, No. 41/2017, No. 11/2018 and No. 46/2019.

66. In determining whether Mr. Köse's detention was arbitrary, the Working Group refers to the principles established in its jurisprudence on evidentiary issues. If the source has presented a *prima facie* case for breach of the international law constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (A/HRC/19/57, para. 68).

Category I

67. The Working Group considers a detention to be arbitrary and to fall under category I if such detention lacks legal basis. In the present case, the Working Group therefore must examine the circumstances of Mr. Köse's arrest and notes that he was arrested on 16 November 2017.

68. The Working Group observes the submission by the source that Mr. Köse was told that the reason for his arrest was his use of the ByLock application and that the arrest warrant did not contain any specific information on any activity carried out by Mr. Köse that would amount to a crime. The Working Group notes that, in its reply, the Government repeatedly stated that the alleged use by Mr. Köse of the ByLock application was sufficient reason for him to be arrested, as it raised suspicions of membership in a terrorist organization.

69. The Working Group recalls that, in accordance with article 9 (2) of the Covenant, anyone who is arrested shall not only be informed of the reasons for the arrest at the time of arrest but shall also be promptly informed of any charges against him or her. As explained by the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person, the obligation found in article 9 (2) has two elements: information about the reasons for the arrest must be provided immediately upon arrest and there must be prompt information about the charges provided thereafter.⁴

70. The requirement to provide reasons for the arrest of an individual also has a qualitative element in that, as noted by the Human Rights Committee, the reasons must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.⁵ The Working Group considers that the Government has failed to prove how the requirements set out in article 9 (2) were met in the present case. The Working Group accepts that the full indictment of a person would take time, but is also of the opinion that the Turkish authorities should have been able to provide Mr. Köse, at the time of his arrest, with the factual specifics indicating the substance of the crime he allegedly committed.

71. According to the Government, the only evidence against Mr. Köse was his alleged use of the ByLock application and his alleged membership in the Fethullah terrorist organization. In these circumstances, the Working Group considers that the Government has not established that Mr. Köse was promptly informed of the charges against him nor of the reason for his arrest at the time of arrest. Moreover, the Government has not substantiated the claim that Mr. Köse's detention meets the criteria of reasonableness and necessity. The Working Group recalls that any derogation from obligations under the Covenant cannot justify a deprivation of liberty that is unreasonable or unnecessary.⁶ The Working Group therefore concludes that the arrest and detention of Mr. Köse amount to a violation of his rights under article 9 (1) and (2) of the Covenant and articles 3 and 9 of the Universal Declaration of Human Rights.

72. Moreover, the Working Group observes that Mr. Köse was not presented before a judicial authority until 29 November 2017, that is, some 13 days after his initial arrest.

⁴ See also opinions No. 1/2017, No. 6/2017, No. 30/2017, No. 2/2018, No. 4/2018, No. 42/2018, No. 43/2018 and No. 79/2018.

⁵ General comment No. 35, para. 25.

⁶ *Ibid.*, para. 66. See also general comment No. 29, para. 3.

73. As the Working Group has consistently argued,⁷ in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group wishes to recall that, in accordance with the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.⁸ This right, which is a peremptory norm of international law, applies to all forms of deprivation of liberty,⁹ and to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures.¹⁰

74. The Working Group further considers that judicial remedy is a fundamental safeguard of personal liberty¹¹ and is essential in ensuring that detention has a legal basis. In the present case, Mr. Köse was not presented before a judge until some 13 days after his arrest and the Government has simply cited compliance with its national law as an explanation for this delay. The Working Group recalls that any derogation from the obligations under the Covenant cannot justify a deprivation of liberty that is unreasonable or unnecessary. The Working Group therefore finds that, without prompt presentation of Mr. Köse before a judicial authority, it cannot be said that his detention was lawful, as it violated article 9 (3) and (4) of the Covenant.

75. Furthermore, since during the 13 days of detention Mr. Köse was not able to challenge his continued detention, his right to an effective remedy under article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant was also violated.

76. Noting all the above, the Working Group therefore concludes that the detention of Mr. Köse was arbitrary and falls under category I.

Category II

77. The source has further argued that the detention of Mr. Köse falls under category II since his arrest and detention were based on the allegation that Mr. Köse had downloaded and used the application ByLock, which is not a crime.

78. The Government denies these allegations, arguing that Mr. Köse was arrested and detained for having committed a crime, namely for being part of a terrorist organization, and cites the usage of the ByLock application by Mr. Köse as the evidence of such criminal activity.

79. In the present case, the Working Group observes that the essence of the allegations against Mr. Köse, as presented by the Government, is his alleged alliance with the Fethullah terrorist organization which, according to the Government, stems from him having downloaded and used the ByLock application. The Government has made detailed submissions on how the ByLock application has been used by the Fethullah terrorist organization. However, the Working Group must observe that these explanations are general explanations about how the ByLock application was used by the Fethullah terrorist organization overall but do not provide any detailed explanation as to how the alleged use of this application by Mr. Köse could be equated with a criminal act. Nor has the Government presented any evidence that Mr. Köse was indeed a member of the Fethullah terrorist organization.

80. The Working Group takes note of the report of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the impact of the state of emergency

⁷ See opinions No. 1/2017, No. 6/2017, No. 8/2017, No. 30/2017, No. 2/2018, No. 4/2018, No. 42/2018, No. 43/2018, No. 79/2018 and No. 49/2019.

⁸ A/HRC/30/37, paras. 2–3.

⁹ *Ibid.*, para. 11.

¹⁰ *Ibid.*, annex, para. 47 (a).

¹¹ *Ibid.*, para. 3.

on human rights in Turkey, in which OHCHR examined the impact of various decrees that were issued by the Government of Turkey and that served as a basis for the dismissal of large numbers of security, military and police officers, teachers, academics, civil servants and health-sector personnel. The Working Group notes that, in that report, OHCHR concluded the following:

The decrees do not establish clear criteria used to assess links of the dismissed individuals to the Gülenist network. As a result, dismissals have been ordered on the basis of a combination of various elements, such as making monetary contributions to the Asya bank and other companies of the “Parallel State Organization”, being a member of a trade union or association linked to the Gülenist network, or using the messenger application ByLock and other encrypted messaging programmes. The dismissals may also be based on reports by the police or secret service about some individuals, analysis of social media contacts, donations, websites visited, or sending children to schools associated with the Gülenist network. Information received from colleagues or neighbours, or subscription to Gülenist periodicals could also be used as criteria for dismissals.¹²

81. The Working Group notes that the case of Mr. Köse appears to follow the pattern described in the report.

82. The Working Group is mindful of the state of emergency that was declared in Turkey at the time. However, while the National Security Council of Turkey had already designated the Fethullah organization, also known as the Gülen group or, as already indicated, the Hizmet movement, as a terrorist organization in 2015, the fact that the organization was ready to use violence had not become apparent to Turkish society at large until the attempted coup in July 2016. As noted by the Commissioner for Human Rights of the Council of Europe:

Despite deep suspicions about its motivations and modus operandi from various segments of the Turkish society, the Fethullah Gülen movement appears to have developed over decades and enjoyed, until fairly recently, considerable freedom to establish a pervasive and respectable presence in all sectors of Turkish society, including religious institutions, education, civil society and trade unions, media, finance and business. It is also beyond doubt that many organisations affiliated to this movement, which were closed after 15 July, were open and legally operating until that date. There seems to be general agreement that it would be rare for a Turkish citizen never to have had any contact or dealings with this movement in one way or another.¹³

83. The Commissioner for Human Rights has also pointed to the need, “when criminalising membership and support of this organisation, to distinguish between persons who engaged in illegal activities and those who were sympathisers or supporters of, or members of legally established entities affiliated with the movement, without being aware of its readiness to engage in violence”.¹⁴

84. The Working Group observes that at the core of the allegations against Mr. Köse is his alleged alliance with the Fethullah terrorist organization, a perception resting exclusively on Mr. Köse’s use of the ByLock application. The Working Group notes the failure of the Government to show how the mere use of such a regular communications application by Mr. Köse constituted an illegal criminal activity, especially given the absence of any evidence that he was in fact part of that organization. Noting the widespread reach of the Fethullah organization, as documented by the Commissioner for Human Rights, “it would be rare for a Turkish citizen never to have had any contact or dealings

¹² OHCHR, “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017” (March 2018), para. 65.

¹³ Memorandum on the human rights implications of the measures taken under the state of emergency in Turkey (CommDH(2016)35), 7 October 2016, para. 20.

¹⁴ *Ibid.*, para. 21.

with this movement in one way or another”.¹⁵ The Working Group takes note of the report of the Special Rapporteur on the promotion and protection of the right to freedom of expression on his mission to Turkey in November 2016 and the information it contains on numerous arrests based purely on the presence of ByLock on the accused person’s computer and ambiguous evidence.¹⁶ The Working Group also notes the recent findings of the Human Rights Committee in *Özçelik et al. v. Turkey* (CCPR/C/125/D/2980/2017), in which it dismissed the mere use of ByLock as sufficient basis for the arrest and detention of an individual.

85. In the present case, it is clear to the Working Group that, even if Mr. Köse had used the ByLock application, an allegation denied by him, he would merely have been exercising his right to freedom of expression. The Working Group notes that freedom of opinion and freedom of expression, enshrined in article 19 of the Covenant, are indispensable conditions for the full development of the person; they are essential for any society and in fact constitute the foundation stone for every free and democratic society.¹⁷ According to the Human Rights Committee, no derogations can be made to article 19 simply because it can never become necessary to derogate from it during a state of emergency.¹⁸

86. Freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers and it includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions.¹⁹ Moreover, article 19 (2) of the Covenant protects all forms of expression and the means of their dissemination, including all forms of audiovisual as well as electronic and Internet-based modes of expression.²⁰

87. The Working Group recalls that this is not the first time it has examined a case involving the arrest and prosecution of a Turkish national for the alleged use of the ByLock application as the key manifestation of an alleged criminal activity.²¹ The Working Group recalls that in those other instances it concluded that, in the absence of a specific explanation of how the alleged mere use of ByLock constituted a criminal activity by the individual concerned, the detention was arbitrary. The Working Group regrets that its views in those opinions have not been respected by the Turkish authorities and that the present case follows the same pattern.

88. The Working Group concludes that the arrest and detention of Mr. Köse have resulted from his exercise of the rights guaranteed by article 19 of the Covenant and article 19 of the Universal Declaration of Human Rights and therefore fall under category II.

Category III

89. Given its finding that the deprivation of liberty of Mr. Köse is arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Köse should have taken place. However, the trial did take place and the source has submitted that there were severe violations of Mr. Köse’s fair trial rights and that his subsequent detention was therefore arbitrary and falls under category III.

90. The Working Group notes that the source has made general allegations that the special courts established to address cases concerning alleged membership in the Hizmet movement lack independence and describes the general practice whereby many judges have been dismissed (see paras. 20–21 above). The source has not, however, made any specific submission as to how the courts examining the case of Mr. Köse lacked independence and the Working Group is therefore unable to make any findings on the matter.

¹⁵ *Ibid.*, para. 20.

¹⁶ A/HCR/35/22/Add.3, para. 54.

¹⁷ Human Rights Committee, general comment No. 34, para. 2.

¹⁸ *Ibid.*, para. 5.

¹⁹ *Ibid.*, para. 11.

²⁰ *Ibid.*, para. 12.

²¹ See opinions No. 42/2018, No. 44/2018 and No. 29/2020.

91. Similarly, since the source has argued that Mr. Köse was not granted a hearing for an extended period of time (see para. 22 above) but does not specify for how long, the Working Group is once again unable to draw any conclusions on this particular submission.

92. The source has also argued that Mr. Köse faced difficulties in accessing legal assistance due to a “climate of fear” (see para. 23). Mr. Köse did, however, have legal representation during the proceedings and so it is unclear whether and how the right to legal assistance of Mr. Köse was specifically affected. The Working Group therefore makes no findings on the matter.

93. Furthermore, the source has argued that Mr. Köse’s applications were denied on insufficient grounds (see para. 22 above) and without any further explanation being given as to when the hearings took place and what the court pronounced. The Working Group thus makes no finding on this particular submission.

94. The source has specified that Mr. Köse and his lawyer did not have full access to the case file (see para. 22 above). The Working Group notes, however, that the Government rebuts this allegation, arguing that confidentiality-related restrictions applied only during the investigation and that, once the indictment had been issued, full access to the case file was provided (see para. 50 above).

95. The Working Group recalls that access to the case file must, in principle, be granted to the detained person from the outset.²² In the present case, Mr. Köse was afforded such access only once the indictment had been issued. However, noting that Mr. Köse and his lawyer were allowed full access to the case file for some four months prior to the commencement of the trial, the Working Group finds that the denial of access from the outset in this case did not prejudice the fair trial rights of Mr. Köse.

96. Finally, the source has argued that Mr. Köse was not promptly notified of the charges against him, which adversely affected his right to prepare for his defence (see para. 22 above). The Working Group observes, however, that the Government submitted that Mr. Köse was sentenced on 8 April 2018. Noting that he had appeared before a magistrate on 29 November 2017 and was notified of the charges then, the Working Group is unable to make a finding.

97. The Working Group makes no findings in relation to category III.

Category V

98. Finally, the source has alleged that the detention of Mr. Köse falls under category V since it constitutes discrimination on the basis of political or other opinion. The Government rejects this allegation, explaining that Mr. Köse was detained because of his alleged membership in a terrorist organization.

99. The present case is yet the latest in a series of cases concerning individuals with alleged links to the Hizmet movement that has come before the Working Group during the past two years.²³ In all these cases, the Working Group has found that the detention of the concerned individuals was arbitrary, and it appears that a pattern is emerging whereby those with alleged links to the Hizmet movement are being targeted on the basis of their political or other opinion. Accordingly, the Working Group finds that the Government of Turkey detained Mr. Köse on the basis of a prohibited ground for discrimination, and that the case falls within category V.

100. The Working Group welcomes the lifting of the state of emergency in Turkey in July 2018 and the revocation of derogations made from its obligations under the Covenant. However, the Working Group is aware that a large number of individuals were arrested following the attempted coup of 15 July 2016, including judges and prosecutors, and that

²² Opinion No. 78/2018, para. 79. See also guidelines 5 and 11 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

²³ See opinions No. 1/2017, No. 38/2017, No. 41/2017, No. 11/2018, No. 42/2018, No. 43/2018, No. 78/2018, No. 10/2019, No. 53/2019, No. 79/2019, No. 2/2020 and No. 29/2020.

many remain in detention and are still undergoing trial. The Working Group urges the Government to resolve these cases as quickly as possible in accordance with its international human rights obligations.

101. In the past three years, the Working Group has noted a significant increase in the number of cases brought to it concerning arbitrary detention in Turkey.²⁴ The Working Group expresses grave concern about the pattern that all these cases follow and urges the Government to implement the opinions of the Working Group without further delay.

102. The Working Group would welcome the opportunity to conduct a country visit to Turkey. Given that a significant period has passed since its previous visit to Turkey, in October 2006, the Working Group considers that it is an appropriate time to conduct another visit.

Disposition

103. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Faruk Serdar Köse, being in contravention of articles 2, 3, 8, 9, 10 and 19 of the Universal Declaration of Human Rights and articles 2 (3), 9, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and V.

104. The Working Group requests the Government of Turkey to take the steps necessary to remedy the situation of Mr. Köse without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

105. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Köse immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure the immediate release of Mr. Köse.

106. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Köse and to take appropriate measures against those responsible for the violation of his rights.

107. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

Follow-up procedure

108. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether Mr. Köse has been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to Mr. Köse;
- (c) Whether an investigation has been conducted into the violation of Mr. Köse's rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Turkey with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

109. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and

²⁴ Ibid.

whether further technical assistance is required, for example through a visit by the Working Group.

110. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

111. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²⁵

[Adopted on 1 May 2020]

²⁵ See Human Rights Council resolution 42/22, paras. 3 and 7.